# THE VALUATION OF PROPERTY IN THE ROMAN LAW[1]

## CONTENTS



## I

## INTRODUCTORY

THE arrangement of this article in subdivisions treating severally of definitions, general rules, and evidence is not to be regarded as an attempt at a rigidly logical division of the subject itself, but rather as a practical way of handling the material, suggested by experience in the preparation of briefs and arguments in valuation cases tried under the common law. In the law of valuation as worked out by the Roman jurists, as well as by the English and American courts, it is often impossible to draw exact distinc-

[1] The substance of this monograph was prepared some years ago as a chapter in a treatise on the law of valuation which the writer has never found time to complete. It has recently been revised by him with special reference to its publication in the HARVARD LAW REVIEW. The writer desires to acknowledge his indebtedness to Mr. Carl H. Bassler, Harvard Law School, 1919, for asssistance in the preparation of the article.

tions between rules of valuation and evidence of value; between the elements or factors of value, and the proof itself. The arrangement adopted in this paper has been found helpful in practice. It makes no pretension to mutually exclusive accuracy.

No attempt has been made to compare the opinions of the Roman jurists in particular cases with the decisions on similar questions to be found in the English and American law reports. The paper is intended merely as an outline, and, so far as a comparison with modern law goes, has intentionally been restricted to general principles.

Certain aspects of the subject should be referred to before entering upon a discussion of the law itself.

*a.* The Importance of the Subject at the Present Day

In view of the multiplicity of decisions on the methods of valuing property to be found in the American and English law reports of the last half century, and of the less extensive but careful treatment of some branches of the subject in the jurisprudence of France, Germany and other countries in Continental Europe, it may be thought that an investigation of the original sources of the Roman law of valuation would be a work of historical curiosity rather than one of present utility.

The law of valuation, as applied by the American and English courts, is, however, almost entirely of recent growth; it has no roots in the ancient principles of the common law; and, as will be seen from the following account, the questions which a modern court of law must answer in determining the value of property are often exactly the same questions that were illumined by the legal instinct and practical sense of Paulus, Ulpian, and the other great lawyers who erected the most enduring monument to the genius of the Roman people — the perfected civil Roman law. There is, moreover, probably more valuation law in the Digest than in all the English law books prior to the nineteenth century. It would seem, therefore, that the manner in which valuation problems were worked out by the Roman jurists might in many cases be considered with profit in our own courts at the present day.

The subject also presents a practically new, if somewhat narrow, field of investigation. As pointed out below, the valuation of property in the Roman law has not, so far as the present writer has

been able to discover, been made the subject of systematic treatment by any mediaeval or modern writer;[2] and in England during the formative period of the common law no attention was apparently ever paid to the precepts or decisions in the Digest on this subject. In some departments of law an extensive use was made by our professional ancestors of the jurisprudence of Rome; but the very practical decisions of the Roman lawyers on the valuation of property seem to have been entirely unknown. This is doubtless to be accounted for by the unmethodical arrangement of the Digest, and by the absence there, as well as in the Institutes, of any separate treatment of this particular subject. Even when all legal writings in England were in Latin, and also after the compilations of Justinian were available in print, no use was made of the opinions of the Roman jurists on the subject of value. The very words used by these writers to designate property values were either unknown or soon forgotten; and from an early period new words of mediaeval origin, such as "valor" and "valentia," were in common use in writs, statutes, charters and other legal documents.

Nor, in modern times, has any accurate use been made by English or American courts and writers of the Roman law of valuation.[3]

Although the main purpose of the present investigation is historical and although the results are necessarily fragmentary and,

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[2] The subject is sometimes apparently covered by the title of a book or article, but not in reality. Thus Erwin Grueber's ROMAN LAW OF DAMAGE TO PROPERTY relates to the estimation of damages in actions under the *lex Aquilia*, but contains less than a page or so on the specific subject of property values.

[3] An instance of the consequences of this unfamiliarity with the subject is furnished by the opinion or *dictum* of the Superior Court for the city of New York in one of the earliest American cases in which the sentimental value of property is considered, and by the repetition of this *dictum* by textbook writers (SUTHERLAND ON DAMAGES, for instance) and by other courts. This case, Suydam *v.* Jenkins, 3 Sandf. 614, was an action of replevin and involved the value of 500 barrels of flour. It had nothing to do with sentimental values; but in the course of a long opinion the court went out of its way to say that in some cases the "pretium affectionis" of the property was to be considered. No authorities are cited, but the court must have thought that this was the law in that system of jurisprudence in which the words quoted originated. Now the Roman law was exactly the opposite; *pretium affectionis* being, as shown below, seldom mentioned in the Digest except as an illustration of the kind of value which was *not* to be considered in a legal appraisal of property or damages. The assumption of the New York Superior Court respecting the legal aspect of a *pretium affectionis* was a complete inversion of one of the commonplaces of the Roman law; but this assumption or *dictum* has been the cause of considerable inconsistency in the American decisions on sentimental value. See *infra*, II, *d*.

in some cases, not free from doubt, the writer trusts that a sufficient body of Roman precedents has been collected to justify the labor involved, and to be useful, whether by way of confirmation, contrast or suggestion, in the consideration of the increasingly important subject of the valuation of property in modern law.

The author also ventures to express the hope that the results of this inquiry into a single branch of ancient jurisprudence may stimulate the *cupida legum juventus* assembled at the Harvard Law School to the prosecution of historical studies in the law.

### *b.* The Difficulties of the Subject

At the outset of the inquiry we are confronted by many difficulties, some of them quite serious. In fact no entirely satisfactory account of the methods by which property was valued by the Romans can now be written. The subject is not treated in the Corpus Juris as a separate branch or department of either administration or law; and the passages referring to methods of valuation are relatively few. Those two chief sources of modern valuation law, the decisions in proceedings of eminent domain and the judicial interpretations of tax statutes, are almost entirely lacking; and we are practically confined to decisions in actions of tort, sales and partition, and to the rules for the appraisal of estates under the *lex Falcidia.*

The language of the Digest, moreover, is often difficult of accurate application. We meet, in the first place, the same inconsistent use of words which is one of the chief difficulties encountered in the study of modern valuation law. There is no single word in Latin corresponding to our "value." The nearest is *pretium;* but that may mean either price, cost, or value; and when used in the sense of value, may, with or without the addition of *verum, justum,* etc., indicate something analogous to our market value, or a concept of a somewhat different nature. *Aestimatio* meant sometimes value, sometimes valuation. *Utilitas, id quod interest, quanti ea res est, quanti alicujus interest,* and similar expressions are often used to indicate what we call value to the owner or the plaintiff; but they are also employed to designate the value of a partial interest in property, or the damage done by an injury to property, or the damages recoverable by the plaintiff in certain cases *dehors* the

property itself, or the amount of compensation generally to which the plaintiff is entitled in the particular action under consideration.

Most modern writers see in this confusion of language little more than the inconsistency of usage apt to exist in a branch of law which has not been subjected to separate or formal treatment. Others profess to discover, at least in so far as the terminology of the subject in compensation cases [4] is concerned, a development of the law from the narrow *verum pretium* of the early period to the *utilitas actoris* of the classic law.

The English and American decisions on the valuation of property are certainly not free from the vice of loose and inconsistent language; but the reported cases are so numerous and the facts in each are so fully set out that we can generally in the end discover exactly what the courts mean. In the Roman law, however, we have, so far as this subject goes, merely a relatively small number of opinions or decisions by the jurists, accompanied, in some cases only, by illustrations; and the use of an inconsistent terminology is peculiarly embarrassing.

Another cause of confusion and uncertainty is the fact that many of the phrases and passages in the Digest, which must now be read according to the apparent or ordinary meaning of the words used, had by the time of Justinian acquired strict technical meanings, which would be readily understood if the writings of the jurists themselves had been preserved. But of the nearly two thousand law books [5] which Tribonian and his colleagues used in the compilation of the Justinian jurisprudence less than half a dozen have survived in their entirety.[6]

Still more embarrassing is the fact that the decisions of the jurists which were incorporated in the Digest were frequently separated from the examples or applications used in the originals by way of illustration. The Roman lawyers, like those of our own race, preferred the concrete to the abstract as a mode of legal expression. The enunciation of a legal principle was generally ac-

[4] The reader will understand, of course, that in this article the word "compensation" is used in its English sense, not as the equivalent of the *compensatio* or *debiti et crediti inter se contributio* (= set-off) of the Roman law; and that by "compensation cases" are meant actions under the *lex Aquilia* and other forms of procedure the object of which was the recovery of damages for the loss of property.

[5] *Duo paene millia librorum;* COD. 1.17.2.1.

[6] The INSTITUTES OF GAIUS, which contain four *libri*, practically complete.

companied by a specific application to a given state of facts; and it was in this shape that the statement became a binding precedent. These illustrations, of vital importance to an understanding of the condensed statements of principle, were generally carried over into the Digest; but in many cases this unfortunately was not done, and the original treatises have been lost.

A further difficulty of interpretation is caused by the undoubted corruptions, consisting largely of omissions and displacements [7] which crept into the text of the Digest at the time of its compilation. The same writer sometimes figures in different parts of the Digest as expressing diametrically opposite views upon the same subject.

It goes without saying that the real meaning of any but the most explicit passages can only be arrived at by a close consideration of the context, by a comparison with other passages and titles, and by paying careful attention to the form of action and to the nature of the final judgment therein.

Still another difficulty for the student of the Roman law is the brevity of the style adopted, and the over-condensed and elliptical opinions in which it results. While there can be no doubt that the language of the Digest conforms far more closely to the Latin tongue as actually used by the Roman people, than does the style of the classic authors, over-condensation of expression was a characteristic of both styles, and is particularly annoying in a law book. Much of it, as found in the Digest, is, of course, due to the use of short technical terms, the full meaning of which the Roman reader was supposed to understand; but elliptical sentences and other partial forms of expression which are not to be explained as technical phrases, are to be found on almost every page of the Digest. Sometimes the subject of the sentence is left out, sometimes the predicate, sometimes the verb; and the insertion of four or five words is often necessary to complete the sentence if full expression is to be given to the thought. Modern libraries are filled with the discussions and controversies which this defect of the ancient law (in the form in which it appears in the Corpus Juris) has created; and

[7] An instance of displacement which affects the subject of this article is furnished by the presence in DIG. 9.2. (*ad legem Aquiliam*) 33. pr. of an opinion by Pedius on the special value of property to individuals, which opinion, according to modern criticism, really belongs in DIG. 35.2 (*ad legem Falcidiam*) where it also appears in *lex* 63. pr.

unfortunately some of them relate to the valuation of property. Sometimes, as in the definitions of market and rental value referred to below,[8] the result of the devotion of the Romans to brevity of language is a condensed lucidity of expression which can with difficulty be imitated in any modern tongue. More frequently the meaning is more or less obscured by the effort to substitute brevity for clarity.

Finally, there is a mixed difficulty of style and grammar which confronts us at the outset, and as some of those who read this article may wish to fill up its outlines by independent studies of their own, a short explanation of the expressions commonly used to designate the value of property to a given person, generally the owner or the plaintiff in the case, may be helpful. Besides the word *utilitas* we have such phrases as *quanti mea interest*, *quanti res est*, *quanti* (or *id quod*) *alicujus interest*, etc., etc. The full thought is sometimes expressed, as in DIG. 19.1.1.pr., where value to the buyer is described as *id quod interest, hoc est quod rem habere interest emptoris;* and in DIG. 43.17.3.11, where the phrase *quanti res est* is defined as *quanti uniuscujusque interest possessionem retinere.*[9] More commonly, however, the phrases used to designate the special value to the owner or plaintiff in the suit of the property in question are the elliptical expressions *id quod interest*, *quanti mea interest*, etc., which the student readily recognizes as purely technical phrases in the law of damages; but he must always study the context, particularly the examples, if any, which are given, and take into account such other passages as bear upon the subject under discussion, before he can safely conclude that the phrase has any reference to the value of property. It may also, and more frequently does, refer to the total compensation or damages involved in the suit, or to the basis of estimating the same; in which case the *utilitas* of the property itself is buried under other considerations. The words

[8] Chapter II, *a*. See also the statement of the rule of "value as a whole" in Chapter III.

[9] See also: *omne quod interest emptoris servum non evinci* (DIG. 19.1.43); *quantum ejus interest possessionem habere* (DIG. 43.4.1.5); *interest legatarii fundum . . . habere* (DIG. 31.54); *ejus rei . . . tanti aestimata est quanti in litem juraverit* (DIG. 6.1.46); *fructuarius aget de fructibus vel quanti interfuit ejus, furtum factum non esse . . . proprietarius vero aget quod interfuit ejus, proprietatem non esse subtractam* (DIG. 47.2.46.1).

Most of these passages refer to the interest or *utilitas* of the plaintiff, buyer, etc., in the lawsuit generally, rather than to the value of the property involved.

"damage" and "damages" are also used in our law not only to indicate the value of property when that is the sole object of the suit, but also to designate the amount of money to which the plaintiff is entitled in cases where the value of the property is a part only of the legal measure of recovery, and in cases where no property at all is involved; but in the Roman law, as well as in modern French and German jurisprudence, the distinctions are not so sharp, and the identification of the particular kind of damage intended is not so easy, as with us.

### *c.* Sources of the Law

The only complete law book which survived the compilations of Justinian and the destructive period which ensued is the Institutes of Gaius, written in the second century A.D. and discovered in 1816. Parts of the works of Ulpian and other jurists have also survived and, together with certain other fragments, are to be found in various modern compilations. The main sources of our knowledge are, of course, the Digest, Codex and Institutes of Justinian, published A.D. 533–534, which, with the Novellae, are collectively known to the modern world as the Corpus Juris Civilis.

Very little assistance in the elucidation of the Roman law of property values is to be obtained from the "Gloss" of the twelfth and thirteenth centuries, or from the writings of the post-mediaeval "Commentators." These writers were not interested in this particular subject.

In modern times we find a vast literature of Roman law, covering investigation, discussion and legislation; the most helpful being, naturally, the law books written in Germany since the adoption of the Roman law. The "Reception" carried over nearly the whole of the Roman law of damages; and the opinions or decisions in the Digest relating to value have not only been the subject of learned and voluminous discussion during the past five hundred years, but constitute the common law of the German states. The chief kinds of value discussed by the Roman jurists have also, since the Prussian code of 1794, been incorporated in German statute law.[10] So far as the writer knows, however, neither the German law books, nor those published in France and other countries

[10] See *infra*, II, *b*.

which make use of the Roman law to a greater or less extent, contain any systematic or comprehensive treatment of the legal methods of valuing property. Hundreds of books and monographs have been written on *id quod interest*, the *Interesse* of the modern German law; [11] but no separate consideration of the detailed methods of law applicable to the valuation of property appears to have been undertaken. So far as compensation value is concerned the subject is still treated as part of the law of "obligations"; which results in a merely incidental discussion of property valuation, and, as in the Digest, in the use of the same phrase to denote both the value of the thing destroyed or taken and the general measure of damages in any kind of an action of contract or tort. The value of property, the collateral losses due to the deprivation of it, the damages resulting from the breach of any kind of a contract, the injury to person or property due to any kind of a tortious act, are all treated by the civilians, ancient and modern, as a single branch of law; and a terminology is used which makes it difficult to see when a property value is intended, and when some other measure of damage or basis of recovery.

The works of French and German writers on the Roman law, particularly the learned law books published in Germany before the adoption in 1900 of the *Bürgerliches Gesetzbuch*, are, nevertheless, indispensable to a full understanding of the subject, and free use of them has been made in the preparation of this article.

## II

## THE DIFFERENT KINDS AND DEFINITIONS OF VALUE

Confining our attention to the passages in which it appears to the writer that the jurist is considering, not the question generally of damages or the value of partial or limited interests, but the appraisal of some particular article of property as such and in its entirety, we find two chief kinds of value referred to.

On the one hand we have what may best be translated as the

[11] The best is probably the well-known treatise of Friederich Mommsen on the *Lehre von dem Interesse* in his BEITRÄGE ZUM OBLIGATIONRECHT (1855), vol. 2. This learned and illuminating discussion of the subject is, however, in parts obscured by the fact that, as in other German law books, whole pages of general argument will be found without a single practical application or illustration. In fact the Digest itself is often easier to understand than a German commentary on the doubtful passage.

general or ordinary value of the property, *verum pretium;* and, on the other hand, the special value of the property to some particular person, usually the owner or the plaintiff in the case, *utilitas actoris.* The latter is a concept corresponding almost exactly to our value to the owner. The former is more or less identical with market value in the modern sense. The basic concepts of value in the Roman law are not, however, as with us, market value and value to the owner; but general value and value to the owner.

Other kinds of value are referred to in the Digest, generally by way of contrast and exclusion; the principal one being the special value of property which is based on the purely sentimental interest or affection of a particular individual, *pretium ex affectu.*

### *a. Quanti Venire Potest* — Market Value

The market value of property, meaning the cash sum for which it could probably be sold on or about the day of valuation, does not figure prominently in the Roman law as an independent concept or kind of value. It is, however, referred to, directly or indirectly, in several places in the Digest; sometimes merely as the sale value of the property in question without any comparison with other kinds of value; [12] sometimes by way of contrast to actual cost; [13] sometimes to indicate the present (discounted) value of future or conditional payments; [14] more often for the purpose of distinguishing value for sale from other kinds of value, such as *verum pretium.*

The phrase used in the Digest to indicate market value is *quanti venire potest,* what the article can be sold for; or *quanti vendere potest,* what the owner can sell it for.

As shown below [15] the basic value of the Roman law is the ordinary value of property, its value under all circumstances to any person, *quanti omnibus valet;* and in most of the passages in the Digest which refer to market value the object is to distinguish that concept or kind of value from *verum pretium.*

Thus, in proceedings for the determination of the quarter part of a decedent's estate which his heirs (and in certain cases the state) were entitled to under the *lex Falcidia* to receive free from the

[12] Dig. 10.3.10.1.

[13] Dig. 14.2.2.4; Dig. 15.3.5.pr.

[14] Dig. 35.2.45.1; Dig. 35.2.55; Dig. 35.2.73.1.

[15] *Infra,* II, *b.*

burden of legacies, it was well settled that the property was to be valued at its common, ordinary or general value to all the world, *verum pretium;* and in the title of the Digest devoted to this law [16] we find it specifically stated that the market value of the property is not to be considered when it differs from *verum pretium.* A slave is not to be estimated at more than his ordinary value, although he could be sold to his own father for more,[17] nor is the fact that he has been given a legacy to be taken into account, although this fact might under the Roman law greatly enhance his market value.[18] And, generally speaking, in proceedings under the *lex Falcidia* the special value of the property to individuals, *utilitas singulorum,* is not to be considered,[19] although this special value must necessarily be included in the *utilitas* which, in actions under the *lex Aquilia,* is the general measure of recovery.[20]

A sharp distinction is drawn between *aestimatio,* meaning ordinary value, and market value in the title of the Digest devoted to the maritime law, *de lege Rhodia de jactu.* The goods jettisoned are to be valued by their *aestimatio* or ordinary value; those subject to contribution at their market value, *quanti venire possunt.*[21]

It was held that in the action *de damno infecto* for the damage due to the destruction of a party wall the defendant was not liable for the value of such *immoderata cujusque luxuria* as expensive mural paintings.[22] Yet such decorations would nearly always affect the market value of the plaintiff's house and wall.

An instructive decision is that contained in DIG. 35.2.63.2, where it is held that although oil may not be worth as much in Spain as in Rome, or in good years as in bad ones, still its value is not to be determined by temporary fluctuations in price caused by accident or abnormal scarcity. *Non ex momentis temporum, nex ex ea, quae raro accidat, caritate, pretia constituantur.* Value, thus defined, may be compared with the "normal value" of the economists, or the "market value under ordinary conditions" of modern German law. It certainly is not market value as understood in English and American law; nor is it the *quanti venire potest* of the Roman law.

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[16] DIG. 35.2. *ad legem Falcidiam.*
[17] DIG. 35.2.63.pr.
[18] DIG. *ib.*
[19] DIG. *ib.*
[20] DIG. 9.2.51.2.
[21] DIG. 14.2.2.4.
[22] DIG. 39.2.40.pr. See Chapter III.

These authorities seem to the writer to make it fairly clear that market value, both as we understand it and as it figures in the Digest, was, in some cases at least, not the same thing as what the Romans called *verum pretium* or ordinary value.

That kind of market value which is known as "current price," meaning the sum at which articles of ordinary merchandise are bought and sold in the open market, is referred to in an edict of the Emperor Anastasius, A.D. 491, which refers to the price at which foodstuffs *in foris venire solent* (κατὰ τὰ ἐπ' ἀγορᾶς ὤνια).[23]

Before passing from the subject of market value, attention may be directed to the singularly appropriate expression for this kind of value used by the Roman jurists. *Quanti venire potest*, what the thing can be sold for, expresses in three words the basic idea of market value. If some such definition as this had been kept constantly in mind by English and American judges there would not be found in our law books the innumerable amplifications and ambiguous definitions which encumber the decisions on market value; and we should be spared the frequent and unprofitable reference to the supposititious buyer who is assumed not only to be willing to purchase, but also to be willing to pay the full value of the property in question to its owner. To effect a sale there must, of course, be some one ready to buy; but there may be no one willing to pay a price measured by actual cost, reproduction cost, value in use, or any other test of the real value of the property to the owner. The introduction of the willing purchaser at a fair price does not help us much in the determination of market values; and it has led to the creation of another useless fiction that unless the property can be sold for approximately its full value to the owner it has no market value at all. The problem of market value is much simplified if we fix our attention, as the definition in the Roman law forces us to do, on the essential object of the inquiry, which is simply to ascertain what in the actual circumstances of the case the property could probably have been sold for on or about the day of valuation.

A similarly apt phrase is used to designate the annual or rental value of property, *quanti locari potest*, what the thing could be leased for;[24] or *quanti locare potes*, what you could let it for.

[23] Cod. 10.27.3.

[24] Dig. 12.6.65.7; where it is said that if I have given you a house towards the

### b. *Verum Pretium; Quanti Omnibus Valet* — Ordinary or General Value

The primary value of the Roman law is the value of the property in question to people generally, *quanti res omnibus valet*, as distinguished from its special value to particular persons, and from its market value where that is enhanced by special or personal circumstances.

The words most commonly used to indicate this kind of value are *verum pretium*, or *verum rei pretium*.[25] Other words or phrases of similar import are *justum pretium*,[26] *pretium rei;*[27] often *pretium* alone;[28] *vera aestimatio*,[29] *vera rei aestimatio*,[30] *justa aestimatio*,[31] *pretii aestimatio*,[32] *rei aestimatio*,[33] *aestimatio corporis*[34] or *ad corpus*,[35] *aestimatio ex veritate*,[36] or simply *aestimatio*.[37] Sometimes we find *veritas*,[38] *rei veritas*,[39] *res vera*,[40] *ipsa res*,[41] *quantitas*,[42] used in the same sense.

Many of the phrases cited are, however, used occasionally in other senses; either to indicate the *utilitas* or special value to the plaintiff, or in a yet broader sense to signify the total measure of recovery in the form of action under consideration, that is the entire *litis aestimatio*. Even such an apparently definite expression

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payment of a debt its annual value is to be accounted for, not at the market rental value of the house, *quanti locare potui*, but *quanti tu conducturus fuisses*, that is, at the rent you would have paid for it. See also Dig. 10. 3. 10. 1 and *infra*, *b*.

[25] Dig. 5.3.20.21; Dig. 10.3.7.12; Dig. 30.81.4; Dig. 40.5.32.1; Dig. 47.2.50. pr.; Dig. 47.8.2.13; Dig. 47.8.4.11.

[26] Dig. 10.3.10.2; Dig. 20.1.16.9; Dig. 24.1.36.pr.; Dig. 40.5.31.4; Dig. 49.14.3.5; Cod. 3.37.3.

[27] Dig. 27.3.1.20; Dig. 43.17.3.11.

[28] Gai. 3.212.

[29] Dig. 35.2.61.

[30] Dig. 50.16.179.

[31] Dig. 23.3.12.1; Dig. 31.1.54; Dig. 32.14.2; Cod. 3.37.3.

[32] Dig. 9.2.23.1.

[33] Dig. 27.3.1.20; Dig. 50.16.193.

[34] Inst. 4.3.10; Dig. 9.2.22.1; Dig. 47.2.80.1.

[35] Dig. 9.2.37.1.

[36] Dig. 35.2.42.

[37] Gai. 3.212.

[38] Dig. 35.2.42.

[39] Dig. 35.2.62.1.

[40] Dig. 35.2.60.1.

[41] Dig. 43.17.3.11.

[42] Dig. 39.2.4.7; Dig. 45.1.38.17.

as *rei ipsius aestimatio* is used in the sense of *utilitas* in DIG. 43. 17.3.11.

In addition to the foregoing words and phrases, the expression *quanti res est* is frequently used in the sense of *verum pretium.*[43] More often, however, especially in the writings of the later jurists, this phrase refers to the value of the property to the owner or to the amount recoverable in the action, and is to be identified with *utilitas* or *id quod interest* rather than with *verum pretium.*

*Aestimatio* is also used in the general sense of valuation;[44] or as meaning a judicial valuation in distinction to a valuation by the plaintiff's oath.[45]

*Justum* was also apparently sometimes used, in connection with *pretium* or *aestimatio*, in the modern sense of just or adequate. See chapter IV, *a*.

It is generally easy to understand from the context, particularly by the aid of the examples given, whether the words in question are used in the strict sense of *verum pretium* or in some other sense. Care has been taken not to include in the foregoing citations any of the doubtful cases.

Although *verum pretium* is the basic concept of value in the Roman law, it is unfortunately nowhere fully defined. The nearest approach to a definition more exact than is implied by the words themselves and the paraphrases cited above is to be found in DIG. 35.2.63.pr. where valuations under the *lex Falcidia* are stated to be based not on the special utility of the property to one of the parties in interest, but on the elements of value *quae communitur funguntur*, and in DIG. 9.2.33.pr. where the general value of a slave is described as *quanti omnibus valeret.*

The closest approximation in modern law to the *verum pretium* of the Romans is probably the *gemeiner Werth* of the Prussian Code of 1794 (the *Allgemeines Landrecht*) and subsequent German statutes. In fact the concepts represented by *verum pretium* and *gemeiner Werth* are considered by the German writers to be identical. This was undoubtedly the understanding of the authors of the *Allgemeines Landrecht*, for the code recognizes three kinds of value; *gemeiner Werth*, *ausserordentlicher Werth* and *Affec-*

[43] DIG. 50.16.179 and 193.
[44] DIG. 9.2.23.6.
[45] DIG. 24.1.36.pr.

*tionswerth*, which correspond, as defined in the code itself, to the concepts of *verum pretium*, *utilitas* and *pretium ex affectu* inherited from the Roman law. The Prussian inheritance tax act of 1873 and its amendments, the Prussian municipal tax act of 1893, and many other tax laws in the various German states prescribe *gemeiner Werth* as the basis of valuation. The most important of these laws are the *Ergänzungssteuergesetze* which, in addition to the ordinary taxes on property based on income or rental value, levy a small tax on its capital value. These laws, beginning with the Prussian act of 1893, generally provide that the property shall be appraised at its *gemeiner Werth;* but the application of this rule to certain kinds of real estate was found to be extremely uncertain, and in 1909 a more definite mode of valuation based on the capitalization of income was adopted for agricultural and forest property.[46] In other tax acts of recent date *gemeiner Werth* has been replaced by market value, or "market value under normal circumstances." The latter would seem to be almost the same thing as the *verum pretium* of the ancient law.

*Verum pretium* may be less than market value, in the ordinary sense, as in the case where a particular buyer might for special reasons give more for the property than its value in use to the ordinary person. On the other hand *verum pretium* may exceed market value, as where in *communi dividundo* the property to be divided consists of a right of user which *neque venire neque locari potest.*[47]

It would appear that *verum pretium* was a kind of value much less easy to determine than either market value or value to the owner; and that, except when identical with market value, it corresponded to no price or amount actually paid in the acquisition or development of property. In the simple civilization of early Rome it may have been much the same thing as actual value; but long before the law developed into the form in which it has come down to us, this concept of value must have become excessively difficult of application. Its survival to and perpetuation in the

[46] The "supplemental tax" acts have given rise to numerous discussions, judicial, parliamentary and economic, of the difference between *gemeiner Werth* and other kinds of value. These discussions, especially the decisions of the Prussian *Oberverwaltungsgericht* on the valuation of property under the act of 1893, are particularly instructive.

[47] DIG. 10.3.10.1.

Justinian jurisprudence is probably to be explained by the desire of the jurists to keep down the extravagant judgments which resulted from the penal damages allowed in actions of tort and from the kind of testimony known as *juramentum in litem*.[48]

### c. *Utilitas; id Quod Interest* — Value to the Owner

As already explained, the value of property which by reason of its peculiar qualities or the circumstances of some particular individual, usually the owner or the plaintiff in the case, is worth more to him than to the world at large is often designated by the phrases *id quod interest, quanti ea res est, quanti mea est, quanti alicujus interest*, and the like. As also noted, however, these phrases were commonly used by the Roman lawyers to designate damages or compensation generally, including the loss to partial interests, as well as to the general owner, by the theft or conversion of property, the amount of damage done by a partial injury as well as by a total destruction of it, and injuries to persons and business as well as to property.

Less ambiguous phrases for the value of property to the owner or its value in use, as distinguished from its ordinary or its market value, are *utilitas; utilitas circa ipsam rem; pretium ex utilitate; utilitas actoris, emptoris, creditoris*, etc. *Utilitas* is often, however, synonymous with *id quod interest* in the sense of damages generally, whether more or less than the value of the property taken. In fact the primary meaning in the developed law of both *utilitas* and *id quod interest* may be said to be the entire damage sustained by the plaintiff in the suit, whether it be a diminution in the value of some particular article of property or not; and it frequently requires much consideration before we can be sure that in a given passage only a property value is referred to.[49]

Care must also be taken not to confuse the *utilitas* of the plaintiff in the property which is the subject of the lawsuit with the penal damages, in some cases twice the value, in others three or four times, which he was allowed to recover in certain forms of action. The *poena dupli, tripli* or *quadrupli* of the Roman law was a substitute for the criminal law of modern times, and, like the punitive damages sometimes allowed in modern law, is not to be

[48] See *infra*, V.

[49] See *supra*, I, *b*.

confounded with the value of the property itself or with the basis of appraisal.

The same caution applies to the passages in which *utilitas* or *id quod interest* is used to designate a penalty created by contract.

Confining our attention to opinions or decisions which seem to relate to the valuation of specific property we are obliged in the first place to note that here, as in the case of *verum pretium*, there is an unfortunate lack of definition; but so many examples are given that we can easily discern the practical identity of *utilitas* with our value to the plaintiff, which phrase it would be difficult to improve upon, as a literal translation of *id quod interest* (or *utilitas*) *actoris*. By this is meant the special value which a given article of property has to its owner by reason of its adaptability to his requirements or desires; a value which may far exceed the general value of the property to all the world, or its value for sale to others.

This concept of value is frequently contrasted with *verum pretium*, and with the actual cost of the property. It is on the other hand distinguished from *pretium ex affectu*, and from market value.

The best illustrations of the kind of value here under discussion are to be found in the title of the Digest relating to the *lex Aquilia*, the damages in which were always based on *utilitas*.

Thus in DIG. 9.2.22.1 it is said that all the *causae corpori cohaerentes* are to be taken into account, such as the special value of one of a pair of mules, the peculiar utility of a horse that made one of a four-horse chariot team, the special value of a slave because he was one of a pair of comedians or musicians. Similar illustrations are found in GAI. 3.212; INST. 4.3.10.[50]

In DIG. 19.1.21.2 the measure of damages in the *actio empti* for a failure by the vendor to deliver the property bought is stated as *omnis utilitas quae modo circa ipsam rem consistit*. As a definition this phrase has given rise to an enormous amount of discussion and speculation, beginning with the mediaeval Gloss and continuing to the present day; and it cannot be said to be established that the sentence refers to property values only. The illustrations which follow seem, however, to relate to property, and to indicate that what the jurist means by *utilitas emptoris* in this passage is the

[50] For further discussion of these passages see *infra*, III.

value to the buyer of the property itself, including every quality inhering in it, and no more. A similar thought is probably indicated by the phrase *damnum quod re vera inducitur* in Justinian's statutory attempt to keep down the judgments in damage cases.[51]

As already pointed out [52] such general phrases as *quod rem habere interest emptoris, interest emptoris servum non evinci, utilitas creditoris quantum ejus interest possessionem habere, quanti uniuscujusque interest possessionem retinere, quanti interfuit nostra servum non esse occisi,* point, as a general thing, not so much to property values as to the total damage sustained, whether inhering in the property or not; and many instances are given of elements of damage *dehors* the property which are nevertheless embraced in the *id quod interest* of the plaintiff. Thus the damage caused by the theft of a will,[53] may be recovered as part of the plaintiff's *utilitas*. A sickening glimpse at the chief blot upon the civil law of Rome is afforded by the application of this rule to the case where the defendant had killed a slave who had with others been guilty of defrauding his owner, the plaintiff in the suit. Here the loss of the opportunity to discover his accomplices by torture was to be included in the damages recoverable in an action under the *lex Aquilia,* that is, *quanti mea interest fraudes servi per eum commissas detegi.*[54]

The peculiar value of a slave to his owner because he has been given a legacy which when collected will become the property of his master may be recovered by the latter from a third party who has killed the slave before the collection of the legacy.[55] At first thought this would appear to be a case of *utilitas* in its broader sense; but the Roman lawyers evidently regarded the master's right to receive the legacy when paid to the slave as an ordinary incident of his property in the latter, and the writer thinks that this would perhaps be the view taken by a modern court if the question could come before it.

Sufficient has been said, we think, to show that the *utilitas* or *id quod interest* of the Roman law, when confined to property values,

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[51] COD. 7.47. See *infra,* VI.

[52] See *supra,* I, *b.*

[53] DIG. 47.2.27.pr.; DIG. 47.2.32.pr.

[54] DIG. 9.2.23.4.

[55] GAI. 3.212; INST. 4.3.10; DIG. 9.2.23.pr.; DIG. 47.2.52.28.

corresponds almost exactly to the concept of value in use to the owner or to the plaintiff in the case, which (when it exceeds market value) is the basis of appraisals for compensation in modern jurisprudence throughout the world.

### d. *Pretium ex Affectu* — Sentimental Values

A kind or element of value only mentioned by the Roman jurists to be rejected, because incapable of representation in money and therefore not to be included in either *verum pretium* or *utilitas*, is that due to purely sentimental considerations, *affectionis aestimatio*,[56] *pretium ex affectu;* [58] or to any quality or attribute which may be described as *affectio*,[59] or which *ad affectionem pertinet*.[60]

The standard illustration of this kind of value is the love which a man feels for the slave who happens also to be his natural son. This special value of the slave to his owner is not to be included in a valuation under the *lex Falcidia*,[61] which depends on *verum pretium;* nor [62] can it be recovered in an action under the *lex Aquilia* in which the measure of damages for the death of a slave is the full *utilitas* of the owner. So in an action to recover the value of the services of a slave, *voluptatis vel affectionis aestimatio non habebitur, veluti si dilexerit eum dominus, aut in deliciis habuerit*.[63] So if A and B have agreed with each other each to free a slave who happens to be the other's natural son, and A performs while B does not, the measure of damages in an action by A against B for breach of contract is the ordinary value of the plaintiff's slave, not the enhanced value to the plaintiff of the defendant's slave due to the relationship between him and the plaintiff.[64]

Where a freedman has died after alienating his master's real estate, the sale cannot be rescinded by the former owner merely *quod illic educatus sit, vel parentes sepulti;* because he had been brought up on it, or because his ancestors were buried there. If the full general value of the property itself had been obtained, there was no *damnum pecuniarum*.[65]

The tie of affection may in some cases be a sufficient foun-

[56] Dig. 7.7.7.2.
[58] Dig. 35.2.63.pr.
[59] Dig. 9.2.33.pr.
[60] Dig. 20.1.6.
[61] Dig. 35.2.63.pr.
[62] Dig. 9.3.33.pr.
[63] Dig. 7.7.6.2.
[64] Dig. 19.5.5.pr.; Dig. 19.5.5.5.
[65] Dig. 38.5.1.15.

dation for an action; [66] but it is never to be included in the damages.[67]

Modern jurisprudence is generally in accord with the Roman law upon this subject. The attempt made in the Prussian Code of 1794 to allow the recovery of the *Affectionswerth* of property in certain aggravated cases did not reflect the German-Roman common law, and is not now to be found in German statute law.

The French *Code Civil*, enacted in 1804 and still in force, contains no recognition of *pretium affectionis*.

The decisions of the French and German courts are also against allowing sentimental or other non-pecuniary considerations to affect the valuation of property.

In England and the United States market value, the price for which the property can probably be sold, may, apparently, in rare cases be based on the sentimental value to a given individual buyer, that is, to some one other than the owner or plaintiff in the case; as where a man owns a portrait of the common ancestor of himself and half a dozen other persons of means, all of whom would, because of family pride, pay for it more than its value as a painting. The question of sentimental value generally arises, however, in cases of value to the owner; and in such cases the weight of authority is in favor of excluding from the valuation all considerations based on the sentiment or affections of the owner. Such considerations, being personal to the owner, are not reflected in the sale value of the property; they rest entirely in the plaintiff's mind; and they are incapable of translation into money. Sentiment may be the reason why the property has a special value to its owner; it may in fact be the basis of the suit, as where a bill in equity is brought to compel the return of heirlooms, slaves, or other property of a peculiar nature. Sentiment may even be regarded as a fundamental cause of value, for that, as Epictetus said, is in the last analysis nothing but the opinion of people about things. It cannot, however, be the legal measure of value to the owner; for there is no way by which his mere opinion, desires or sentiments

[66] See, for instance, DIG. 17.1.54.pr.; DIG. 18.7.6.pr.

[67] Of course in cases where the plaintiff's oath as to the damage sustained was, as in the earlier law, to be taken as final, any kind of a *pretium ex affectu* could be included. The peculiar procedure known as the *juramentum in litem* was one of the causes for the preposterous judgments in damage cases which so troubled the Roman jurists. See Chapters V and VI, *infra*.

can be translated by a court of law into money. Value to the owner, whatever its mental basis, can only be measured by such tests as original cost, or reproduction cost less depreciation. This is in accord with the Roman law; although, as pointed out above,[68] there are a few American decisions, based on an unaccountable mistake in an early New York case, as to what the Roman law on this subject really was, which look the other way.

## III

## THE GENERAL RULES OF VALUATION

The general rules or methods of valuation were much the same as with us.

We have first the rule of value in money. In tax appraisals and other valuations which are not for purposes of compensation no one would be likely to suggest any other rule. In compensation cases also, as shown by the decisions cited in Chapter II, the value of the property is to be expressed, and must be capable of expression, in money. This is in conformity to the general principle of the Roman law that only such damages as are capable of reduction to money can be recovered in an action for compensation. *Ea enim in obligatione consistere, quae pecunia lui praestarique possunt.*[69] The compensation might, however, be fixed by contract or statute as payable in property rather than in money. See, for instance, the cases of compensation in kind prescribed in edicts of eminent domain, referred to *infra* in IV, *a*.

Then comes the rule of present value. All appraisals, whether in compensation or other cases, are to be made *secundum praesens pretium*[70] *in praesentia*,[71] *praesentis temporis;*[72] that is as of the day of valuation, regardless of actual cost, or of the value of the property in the past,[73] or of the possible proceeds of a future sale.[74]

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[68] *Supra*, I, *a*.

[69] DIG. 40.7.9.2. Modern opinion is divided as to whether this rule applied to all actions for damages. Express contracts were apparently held to be valid, although the subject matter was not always of a pecuniary character. As to strict property values there seems to be no reason to believe that any exception to the general rule was recognized.

[70] DIG. 35.2.62.1.

[71] DIG. 35.2.63.pr.

[72] DIG. 47.8.4.11.

[73] DIG. 49.14.3.5.

[74] DIG. 35.2.63.pr.

In like manner property accruing in the future, such as an annuity, or a promise to pay money without interest at some future date, is to be taken at its present value, in view of the probabilities of the situation. If Titius is given a legacy payable so much a year it is to be valued in proceedings under the *lex Falcidia* at *quanti venire id legatum potest in incerto posito quamdiu victurus sit Titius;* that is, at what it could be sold for in view of the uncertainty as to how long the legatee will live.[75] So a debt payable *in futuro* is to be valued, *quanti ea spes obligationis venire possit,* that is at its present or discounted market value.[76]

In the next place we have, expressed in singularly apt language, the principle that the appraisal must represent the value of the property as a whole, not the aggregate value of its component parts or units, estimated separately: *universae res aestimari debent, non singularum rerum partes.*[77] This is the modern rule of "value as a whole."

The necessity for taking into account the capacity or availability of the property for any and all uses which have pecuniary value is laid down in the decisions cited above in the discussion of *utilitas: causae corpori cohaerentes aestimantur;*[78] and *omnia commoda quae . . . pretiosiorum servum facerent, haec accedere ad aestimationem ejus dicendum est.*[79] This is the modern rule of "capacity (or adaptibility) for use." The passage first cited is followed by the statement that the appraisal is to include not only the *perempti corporis aestimatio . . . sed et ejus ratio haberi debet, quo cetera corpora depretiata sunt.* This may be regarded as an alternative method of valuation, comparable with the double process of our law of eminent domain as applied to partial takings of land. The compensation can be based either on a direct valuation of the part taken estimated with reference to its utility in connection with the part not taken, or on the difference between the value of the whole tract before the taking and the value after the taking of the part not taken. The result should be the same whichever process is followed. As applied to articles of personal property as in DIG. 9.2.22.1, the first process indicated by the jurist, that of a direct valuation of the property, taking into account all *causae corpori*

[75] DIG. 35.2.55.
[76] DIG. 35.2.73.1.
[77] DIG. 10.2.52.3.
[78] DIG. 9.2.22.1.
[79] DIG. 9.2.23.6.

*cohaerentes*, would appear to be the more logical and also the more simple method. The opinion in DIG. 9.2.23.6 refers to extra property damages as well as to property values. An excellent paraphrase of the rule here under discussion is given by the glossator Azo: *non tantum ipsius corporis . . . fit aestimatio, sed etiam computantur ultilitates corpori cohaerences.*[80]

The Roman law was that the plaintiff's case must be founded upon *honesta causa;* and although no application of this rule to the valuation of property has been noted, it cannot be doubted that in the jurisprudence of Rome, as in that of modern countries, a value based upon an illegal use was not to be taken into account.

The decision referred to in the chapter on market value that the cost of expensive mural paintings is not to be included in the value of a party wall which the defendant has destroyed was cited for the purpose of noting the difference between market value and *verum pretium*. According to the general opinion of modern critics, it is probably not to be taken as a denial of the right to recover the so-called "luxury value" of property. The passage in question is thought rather to indicate an independent proposition of the law of party walls that the co-owners have each a right against the other only to the maintenance of a reasonable wall from a structural standpoint.[81] If the case means that luxury values, as such, are to be excluded from a property valuation, it is not in accord with the law of any modern state.

There is a passage in the Digest in which the words *formale pretium* are used to indicate a kind of value or a mode of valuation which is not to be considered: *nec quidquam eorum formali pretio aestimandum.*[82] The phrase occurs nowhere else, and its meaning is uncertain. Some modern writers regard it as a paraphrase of *utilitas singulorum* or *ex affectu*, or as meaning an imaginary value; others think that it refers to assessments for taxation. Inasmuch as the passage occurs in a discussion of the proper mode of valuing property under the *lex Falcidia*, which was essentially a revenue law, the writer inclines to the view that what Ulpian meant was that in estimating the Falcidian quarter or in applying the *lex Julia et Papia Poppaea*,[83] the actual present value

[80] *Summa*, fol. 52.

[81] See DIG. 39.2.39.4 and DIG. 8.2.13.1.

[82] DIG. 35.2.62.1.

[83] See *infra*, IV, *b*.

of the property was to be taken, rather than the figure that might appear on the official tax rolls.[84] If so, the rule accords with modern law.

## IV

## APPLICATION TO PARTICULAR PROCEEDINGS

### *a.* In Compensation Cases

As in modern law, a person suing in any of the ordinary forms of action for the loss of his property was, as a general rule, entitled to recover its value to him; that is, the full *utilitas circa ipsam rem* (sometimes doubled, trebled or quadrupled as a penalty) was the basis of the valuation.

This was certainly the case in actions of contract, such as the *actio empti* for the non-delivery of property bought of the defendant,[85] and in actions of tort under the *lex Aquilia;*[86] and it was probably the rule in most compensation suits. There is, however, much apparent inconsistency in the statements of the jurists on this subject, and there is a corresponding conflict of opinion among modern critics. Some of the inconsistencies in the Digest seem to be due to the constant effort of the jurists to mitigate the severity of the extravagant judgments which resulted from the *juramentum in litem* and the right to penal damages. Others are perhaps to be explained by the fact that *utilitas* is used in cases where the plaintiff has only a partial interest in the property, as well as in cases where he owns it outright.

The extent to which the principle of public law now known as eminent domain was invoked for the acquisition of private property has been the subject of much discussion.

An early instance of something quite similar to eminent domain is furnished by the *lex Icilia* (*circa* B.C. 454). The Aventine was supposed to be public property, but had been invaded and improved by private persons without authority. Lucius Icilius, a tribune and a leader of the plebeians, forced the Senate to pass a law providing for the division among the people of the lands wrong-

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[84] In Dig. 50.15 (*de censibus*) 4.pr. we have *Forma censuali cavetur ut*, etc., i. e., it is provided in the tax regulations that, etc.

[85] Dig. 19.1.1.pr.

[86] Gai. 3.212; Dig. 9.2.22.pr.; Dig. 9.2.23.pr.; Inst. 4.3.10.

fully held by the present occupants upon paying the cost of the buildings as estimated by appraisers.[87]

Frontinus says that materials taken out of private land for public works were paid for at a price *viri boni arbitratu aestimata.*[88]

Private buildings required for the embellishment of the schools at Constantinople could be acquired for a *competens pretium.*[89] Sometimes when land was acquired for public buildings compensation was made to the landowner in the form of a grant of the right *superaedificandi;* that is, of the right to build upon and over the new building.[90] Where land was taken for the construction of a tower in Constantinople the landowner was compensated by a right to live in the tower when built.[91] Sometimes the compensation took the form of a remission of taxes.[92]

Reference is made by Ulpian in a passage preserved in the Digest,[93] to a decision of the Emperor Antoninus that one who desired access through another's land to his own ancestral burying place could procure a right of way by paying the landowner its *justum pretium.* Nothing is said as to how this value was to be estimated; and the case is regarded by some modern writers as not a true instance of expropriation, because the object was not a public one.

An edict of Justinian, A.D. 535, provided that church lands could be taken for such other purposes as the authorities might deem to be in the public interest upon condition that the religious bodies should receive other property of equal or greater value.[94] The lands taken were themselves public property, and the statute is therefore not strictly one of eminent domain.

Notwithstanding the paucity of surviving precedents for the expropriation of real estate, the general opinion seems to be that this function of government must have been freely exercised, par-

[87] LIVY, HISTORY OF ROME, Book 3, § 30; DIONYSIUS, ROMAN ANTIQUITIES, book 10, §§ 31–32. A few years later Icilius was one of the heroes of the tragedy of Virginia which brought about the fall of the Decemvirate. Dionysius describes him as an active man, and "for a Roman not uneloquent."

[88] De aquaeductibus No. 125.

[89] COD. TH. 15.1.53.

[90] COD. TH. 15.1.50.

[91] COD. TH. 15.51.

[92] COD. 10.27.2.pr.

[93] DIG. 11.7.12.pr.

[94] Nov. 7. (*Ne res ecclesiasticae alienentur*) 2.1.

ticularly under the later emperors, in aid of highways, municipal buildings and other public improvements; and it is singular that so little has survived relating to the basis of compensation. The precedents cited above show that in such cases a *pretium competens* or a *justum pretium* was to be paid. In one particular the Roman practice was at variance with modern ideas; compensation in other property or rights of property, compensation in kind, having evidently been regarded as *competens* or just. Where the compensation was payable in money we do not know whether the landowner was entitled only to the *verum pretium* of the property, or to its market value, or (as in modern law) to its full value to him.[95]

A procedure somewhat analogous to eminent domain was provided for the acquisition of foodstuffs required in times of famine, compensation being made on the basis of *justum pretium* or of current price.[96]

Another instance of the exercise of a power analogous to that of eminent domain is furnished by the compulsory sale or manumission of slaves for various reasons. Masters who maltreated their slaves could be forced to set them free, *bonis conditionibus ut pretium dominis daretur;*[97] in criminal cases a slave could be put to the torture if his master was paid his value;[98] in two cases the Emperor Tiberius exercised this right in aid of the state treasury,[99] as also Augustus before him;[100] in some cases the compulsory sale of a slave could be brought about in return for public services, the owner receiving the *pretium* of the slave from the treasury;[101] and where one of the co-owners of a slave wanted to free him and the other did not, manumission could, under the later emperors, be forced on the dissenting owner by paying him the value of his interest in the slave.[102] Except in the case where the price was fixed

[95] The last-named alternative is supported in Georg Meyer's RECHT DER EXPROPRIATION, 1868, pp. 271–272.

[96] COD. 10.27.2 and 3. See *supra*, II *a*.

[97] INST. 1.8.2.

[98] DIG. 48.5.27.pr.

[99] TACITUS ANN. 2 ch. 30; 3 ch. 67.

[100] DIO CASS. 55.5. This practice was put a stop to by the later emperors. DIG. 48.18.1.18.

[101] COD. 7.13.2.

[102] INST. 2.7.4; DIG. 40.12.30. In A.D. 530 Justinian established a fixed scale of prices, dependent on age and other conditions, for application to this situation. COD. 7.7.1.

by statute, no indication of the basis of compensation, whether market value, *verum pretium* or *utilitas*, has been discovered.

### *b.* In Other than Compensation Cases

Except where the object of the litigation was to furnish compensation for the loss of property, the basis of appraisal was not its value to the owner, or its market value; but its ordinary value, *verum pretium.*

This was the case in the action known as *communi dividundo* for the partition of specific property owned in common,[103] and the same is undoubtedly true of *familiae erciscundae*, an action for the partition of inheritances. Also in litigation over *caduca* or failing legacies, in suits for the distribution of property in payment of debts, and in proceedings under the *lex Falcidia* for the determination of the quarter interest of the heir in inheritances. In the last-named case the authorities are clear that the appraisal is to be based on the ordinary value of the property,[104] and there can be little doubt that the same rule applied to other proceedings named.

Generally speaking, in all kinds of what we should call probate proceedings the basis of valuation was *verum pretium;* as where the heir is to account for a legacy of property which the testator did not own.[105] And this was the rule for determining the Falcidian quarter even if the heir had paid more for the property than its *verum pretium.*[106]

Some of the paragraphs in the title of the Digest *ad legem Falcidiam* [107] relate evidently to valuations for the *vicesima hereditatum* or tax on legacies in aid of which this law was enacted, as well as to the Falcidian quarter.[108] Other paragraphs of this chapter relate as well to valuations of *caduca* under the *lex Julia et Papia Poppaea.*[109] The inference is that appraisals for all these purposes were to be made on the same basis, that of the *verum pretium.*

Except for the foregoing rules, which are definite enough as far as they go, the directions, either judicial or administrative, which

[103] Dig. 10.3.10.2.
[104] Dig. 35.2.42; Dig. 35.2.62.1; Dig. 35.2.63.pr.; Dig. 30.81.4.
[105] Dig. 30.71.3; Dig. 32.14.2.
[106] Dig. 35.2.61.
[107] Lib. 35.2.
[108] Dig. 35.2.68.
[109] Dig. 35.2.63.pr.; Dig. 35.2.62.

have survived concerning the method or basis of the appraisal of property for taxation are extremely few; and we are thus, for the Roman law, deprived of what in modern systems is a fruitful field of information for the subject in hand — statutory definitions, administrative instructions and judicial opinions on the elements of value to be considered in the assessment of property for taxation.

As to the ordinary taxes on real estate we know that from the *tributum ex censu* of the early period down to the latest times taxes of various kinds were assessed on the capital value of land. The mode of estimating the *tributum ex censu*, which lasted till the conquest of Macedon, is not known; but some slight information has come down to us concerning the basis of the *tributum*, *vectigal* and other land taxes of the imperial period. These taxes sometimes took the form of a percentage in kind of the annual produce, but in some cases seem to have been based on the net income or annual earning capacity of the property, or on the capitalized value thereof.[110] About the only evidence we have as to the basis for estimating these land taxes is the statement by Hyginus that the land was valued *ad modum ubertatis*, or *pro aestimio ubertatis*,[111] and an imperial rescript that the income of land for purposes of taxation is not the actual yield but the proper net income under sound methods of agriculture.[112]

## V

## EVIDENCE AND PROOF

Comparatively little has survived respecting evidence of value as distinguished from the basis or rules of valuation.

The decisions cited in the foregoing pages indicate that actual cost, current price, utility for various purposes, rental value, earning capacity, future prospects, were, as in modern law, admissible in evidence; and that fertile field of modern testimonial endeavor known as "reproduction cost" may have been in the mind of Paulus when he says that in actions under the *lex Aquilia* the recovery is *quod aut consequi potuimus, aut erogare cogimur*.[113]

A few words may be added about the employment of experts,

[110] Like the Massachusetts tax laws under the Province Charter.

[111] *De limitibus constituendis*. See 5 MARQUARDT-MOMMSEN, RÖMISCHER ALTERTHÜMER, p. 216. *Aestimium* is late Latin for *aestimatio*.

[112] DIG. 49.14.3.5.

[113] DIG. 9.2.33.pr.

and concerning that peculiar judicial procedure known as the *juramentum in litem.*

Opinion or expert evidence of value was apparently not received. This is contrary to the view taken by some modern writers, and it is difficult to see how the Roman courts could have got along without such aid; but the writer has yet to discover a single passage in the sources which points to the use of expert witnesses on the value of property. Much of the litigation in Rome was conducted before *arbitri* or *boni viri* (indifferent third parties) selected by the parties or appointed by the court; but they were not witnesses, nor (necessarily) experts. Surveyors,[114] midwives,[115] physicians, and other *artis periti* were used as *arbitri* or referees, and also as expert witnesses to facts; but no reference to the employment of experts to give opinions on value has been discovered.

The *juramentum in litem* is not to be considered as testimony in the modern sense. It was a mode of proof imposed upon the defendant in certain forms of action as a penalty for *dolus* or *contumacia;* and consisted in permitting the plaintiff to fix the value of the property in question by his own oath. *Actori permittetur in litem jurare, quanti sua interest . . . tanti condemnetur reus.*[116] In the earlier period this oath was conclusive; but in the developed law the court could in some cases fix a maximum, or disregard the sum sworn to by the plaintiff, or deny the privilege altogether.[117] This practice, especially in cases where the plaintiff was allowed to recover two to four times the value of the property involved, led inevitably to the *immensa* or *infinita pretia* which both jurists and legislators endeavored to discourage, but apparently without success; for the *juramentum in litem* continued to the end.

## VI

## CONCLUSION

The foregoing account of the valuation of property in the Roman law is admittedly inadequate; but the writer thinks that it goes as far as the authorities clearly warrant.

Frequent reference has been made to the fact that in the civil

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[114] DIG. 10.1.8; DIG. 11.6.3.4; COD. 3.39.3.

[115] DIG. 25.4.1.pr.

[116] DIG. 12.3.10; DIG. 5.1.64.pr.

[117] DIG. 12.3.4.2; DIG. 12.3.5.1 and 2.

law the valuation of property for compensation purposes is treated under "obligations" generally; the *utilitas* of the plaintiff in the broader sense of the word, that is, the total damage sustained by him, being the direct object of the inquiry. In this mode of treatment the value of any property which happens to be involved in the case is absorbed in the ultimate measure of recovery, and is not necessarily made the subject of separate appraisal. The thoroughgoing civilian may object to any treatment of the subject of value in the Roman law which departs from this method of theoretical discussion; but a departure is necessary if we are seeking to group the decisions on property values in compensation cases with those in cases which do not involve the question of compensation. A departure from the obligation theory of the civil law is also necessary if any comparison or contrast is to be drawn between the methods of valuing property in the Roman law and those which obtain in a legal system which, like ours, proceeds upon the theory that in a case where the value of property is involved, the property itself is first to be valued, and then if there are any other elements or factors to be included in the judgment, these are to be established separately.

The subject of property valuations can be treated in either way; but if the object, or one of the objects, of the study is a comparison between the general principles of valuation as found in the Roman law and those of the Anglo-American common law, the same method must be adopted for both systems. Owing to the fact that the obligation theory as developed by the civilians has not been adopted in our system, the basis of comparison used by the writer — that furnished by the decisions in the Digest which seem to relate to property values as such — would appear to be the only practicable one.

The English and American system is also, in the writer's opinion, better than that of the civil law for two reasons: it is more direct and simple, and it covers value throughout the law. Moreover, it has always seemed to the writer that while the germs of the obligation theory can be found in the Institutes of Gaius and Justinian, the actual opinions or decisions of the Roman jurists, as compiled in the Digest, are based, in many cases at least, upon a process of reasoning which is more like the direct methods of property valuation used in our common law.

The question, therefore, is whether the comparison has been made properly. This depends — at least in so far as compensation cases go — on whether the passages selected refer to the property itself, or merely to the plaintiff's "interest" in the case, that is, on whether, to use the language of the Commentators, the *utilitas* in question is *circa rem* or *extra rem*. The writer has done the work as carefully as he can, and submits it in the belief that while some of his interpretations may not be free from doubt, no substantial error has been committed.

So far as the results of this investigation go, the reader will note the general identity with modern law of the rules laid down by the Roman jurists; and he cannot fail, we think, to appreciate the applicability to present circumstances of many of the decisions cited. He will also note the special efforts to limit the appraisal of property to its normal value for sale or use; but he will suspect that notwithstanding these efforts the effect of doubling and quadrupling the value of the property in actions of tort, and of allowing the plaintiff in cases where the defendant was in the wrong to fix the damages himself, must have resulted in excessive valuations and preposterous judgments. This was the fact, and was the cause of constant complaints, which culminated in the much-discussed edict issued by Justinian in A.D. 531, *De sententiis quae pro eo quod interest proferuntur*, on judgments in damage cases. This statute [118] provided that the recovery in cases where the value was fixed, as in sales, leases and contracts, should never exceed twice the value of the property in question; and that in other cases, where the value was uncertain, the court should determine for itself and by its own devices what the property was really worth. The object of the law, as therein stated, was to put an end to those *machinationes et immodicae perversiones*, to that *infinita computatio*, which had led to *circuitus inextricabiles* and to the frequent total failure of the litigation by reason of the impossibility of collecting the judgment. This part of this edict might with profit be used by modern courts when confronted by the extravagances of testimonial experts on value.

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[118] COD. 7.47.